IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

FUSION ELITE ALL STARS, et al., Plaintiffs, v. VARSITY BRANDS, LLC, et al., Defendants.	Case No. 2:20-cv-02600-SHL-cgc

PLAINTIFFS' NOTICE OF FILING RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs hereby provide the Court with a response to Defendants' Notice of Supplemental Authority (Dkt. 134), regarding the June 28, 2021 decision of the United States District Court for the District of Columbia in *New York v. Facebook, Inc*., No. 20-cv03589 (D.D.C. June 28, 2021) ("*Facebook*").

In *Facebook*, the various state plaintiffs sought only injunctive relief, not damages. *Facebook*, Slip Op. at 1-3. Specifically, the states requested two forms of equitable relief: (1) divestiture of companies that Facebook had acquired almost a decade ago; and (2) termination of an allegedly anticompetitive policy that Facebook adopted more than five years before the filing of the complaint. In dismissing the action, the court emphasized that the states had not alleged Facebook had *implemented* its allegedly anticompetitive policy during the statute of limitations period, noting that had Facebook done so, its conduct *could* constitute an actionable antitrust violation. *Id*. at 2-3.

Defendants here assert that *Facebook* bars claims based on acquisitions made before the statutory period. Dkt. 134 at 1 (citing *Facebook*, Slip Op. at 43). Defendants are wrong. The opinion held only that such a delay bars equitable relief, particularly divestiture, given how difficult it is to unwind acquisitions years after they occur. *Facebook*, Slip Op. at 42-43. Plaintiffs here are not seeking to unwind any acquisitions. At best for Defendants, then, *Facebook* could provide persuasive—although not binding—authority on the injunctive relief this Court should issue.

Further, *Facebook* supports Plaintiffs' claims to the extent Defendants *implemented* all or part of their anticompetitive plan during the statutory period, including by charging

supracompetitive prices.[1] That is exactly what Plaintiffs allege here. *See, e.g.*, Consolidated Complaint ("CC") at ¶¶ 8, 10, 21, 29, 30, 33-34, 40, 57, 128, 144, 202, 228, 238, 244-45, 247, 251, 257, 259, and 261.

Defendants also contend that *Facebook* "held that conduct that is not anticompetitive as a matter of law cannot provide the basis for a claim under Section 2 when combined with. . . out-of-period acquisitions." Dkt. 134 at 1. In fact, the district court there acknowledged that separate lawful acts *might* combine in such a way as to violate the antitrust laws "because competition can die from a thousand small cuts just as easily as from one large blow." *Facebook*, Slip Op. at 63 (citation omitted).

[1] Overcharges imposed, and other anticompetitive conduct occurring, during the statutory period can give rise to timely antitrust claims, including based in part on acquisitions that took place before the statute of limitations period. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 499-500, 502 (1968); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 296 (2d Cir. 1979); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2013 WL 2181185, at *29 (E.D. Tenn. May 20, 2013); *In re Se. Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 947 (E.D. Tenn. 2008); *see also Le v. Zuffa, LLC*, 216 F. Supp. 3d 1154, 1169 (D. Nev. 2016); *Meijer, Inc. v. 3M*, 2005 WL 1660188, at *3-4 (E.D. Pa. July 13, 2005).

Dated: July 1, 2021

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CERTIFICATE OF SERVICE

I, Benjamin A. Gastel, hereby certify that on the 1st day of July 2021, I served a copy of Plaintiffs' Response to Defendants' Notice of Supplemental Authority via the Court's CM/ECF Electronic Filing System upon the following Counsel:

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